No. 96-1674

Supreme Court, U.S.
FILED
JUN 2 1997
CLERK

In The
Supreme Court of the United States
October Term 1996

THOMAS J. BYRNES
and
RICHARD C. OTTO

Petitioners,

v.

LCI COMMUNICATIONS HOLDINGS CO..
LCI COMMUNICATIONS, INC.
LITEL COMMUNICATIONS CORPORATION
LITEL TELECOMMUNICATIONS CORPORATION

Respondents.

Petition For Writ of Certiorari
To The Ohio Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Russell A. Kelm
Law Offices of Russell A. Kelm
37 W. Broad Street, Suite 860
Columbus, Ohio 43215
(614) 240-5900
Attorneys for Petitioners
Thomas J. Byrnes and Richard C. Otto

June 2, 1997

QUESTIONS PRESENTED

1. When a terminated employee is not replaced, should a jury verdict for the employee based on overwhelming circumstantial evidence of age discriminatory animus by the decisionmaker be overturned by an appellate court using *McDonnell Douglas v. Green,* to restrict, rather than expand, the ways to prove age discrimination?

2. Does the Seventh Amendment permit the Ohio Supreme Court to weigh the sufficiency of evidence supporting a jury verdict in order to subjectively reach an election year goal of reversing a large jury verdict against an age discriminating employer?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
I. FEDERAL JURISDICTION EXISTS WHERE A STATE COURT DECISION FAIRLY APPEARS TO REST PRIMARILY ON FEDERAL LAW, OR TO BE INTERWOVEN WITH FEDERAL LAW.	1
II. THE REEXAMINATION CLAUSE OF THE SEVENTH AMENDMENT APPLIES TO A STATE SUPREME COURT REVERSAL OF AN AGE DISCRIMINATION JURY VERDICT BASED ON ITS MISINTERPRETATION OF FEDERAL DECISIONAL LAW	4
CONCLUSION	10

TABLE OF AUTHORITIES

Page

Cases

Ayers v. Watson, 137 U.S. 584 (1890) 6

Barker v. Scovill, Inc., 6 Ohio St.3d 146, 451 N.E.2d 807 (1983) 1,2,3,5

Barnes v. GenCorp., Inc. (C.A. 6, 1990), 896 F.2d 1457 2

Byrnes v. LCI Communication Holdings Co., 77 Ohio St.3d 125, 672 N.E.2d 145 (1996) 1

Curtis v. Loether, 415 U.S. 189 (1974) 5,6

Delaware v. Prouse, 440 U.S. 648 (1979) 4

Dimick v. Schiedt, 293 U.S. 474 (1935) 6

Furnco Construction Co. v. Waters, 438 U.S. 567 (1978) 8

Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108 (1963) 9

Gasperini v. Center for Humanities, Inc., 116 Sup. Ct. 2211 (1996) 6

Indiana ex rel. Anderson v. Beard, 303 U.S. 95 (1938) 7

Insurance Co. v. Folsom, 85 U.S. 237 (1873) 6

Justices v. Murray, 76 U.S. 278 (1870) 7

Kohmescher v. Kroger, 61 Ohio St. 3d 501, 575 N.E.2d 439 (1991) 2,3

Luckenbach S.S. Co. v. United States, 272 U.S. 533 (1926) 6,7

Michigan v. Long, 463 U.S. 1032 (1983) 3,4

Mauzy v. Kelly Services, Inc., 75 Ohio St. 3d 578, 664 N.E.2d 1272 (1996) 1-4

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 1,2,4,8,9

Minneapolis & St. Louis Ry. Co. v. Bombolis, 241 U.S. 211 (1916) 5

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 7,8

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 9

Portman v. American Home Products Corp., 201 F.2d 847 (2d Cir. 1953) 7

Quinn v. Millsap, 491 U.S. 95 (1989) 7

Railroad Co. v. Fraloff, 100 U.S. 24 (1879) 6

Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29 (1944) 10

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 2

United States v. Laub, 37 U.S. 1 (1838) 6

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 8

Walker v. Sauvinet, 92 U.S. 90 (1875) 5

Washington & Georgtown Ry. Co. v. McDade, 135 U.S. 554 (1890) 9

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 4,7,8

Statutes and Rules

29 U.S.C. § 623 4

Ohio Revised Code § 4112.02 5

Ohio Revised Code § 4112.14 5

Ohio Revised Code § 4112.99 5

Constitutions

Seventh Amendment 5,6,7,9

I. Federal Jurisdiction Exists Where a State Court Decision Fairly Appears to Rest Primarily on Federal Law, or To Be Interwoven With Federal Law.

Respondents would minimize the impact federal law has on the Ohio Supreme Court when analyzing an age discrimination claim. They state that "at most, the Ohio Supreme Court [in *Byrnes*] merely cited *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) once, noting in passing that the earlier [decision in] *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146 (1983), . . . had adopted a similar framework." Resp. Brief at 2-3. In fact, the Ohio Supreme Court's decision in this case relies upon *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St. 3d 578, 664 N.E.2d 1272, which was decided just six months before the Ohio Supreme Court's decision here (A-7 through A-8). There was no reason for the Ohio court to restate its clarification of the "methods for establishing a prima facie case of age discrimination" as so fully set forth just six months previously in *Mauzy*. Therefore, in order to fully understand the court's analysis in this case, this Court needs to consider the *Mauzy* decision.

In June 1996, the Ohio Supreme Court correctly clarified "certain aspects of the requirement for establishing a prima facie case of age discrimination." *Mauzy v. Kelly Services, Inc.*, 75 Ohio St. 3d 578, 664 N.E.2d 1272, 1276 (1996). The Court relied upon its previous holding in *Barker v. Scovill, Inc.*, 6 Ohio St. 3d 146, 451 N.E.2d 807 (1983), where the Court "adopted the analytic framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, [411 U.S. 792 (1973)], for use in Title VII cases . . . ."

Mauzy, 664 N.E.2d at 1276. The Court adopted as its own the *McDonnell Douglas* prima facie case and burden-shifting analysis.

Mauzy then set forth the Ohio Supreme Court's 1991 modification of the *Barker* prima facie case by indicating that the four-prong test is only necessary when direct evidence is absent. This modification was announced in *Kohmescher v. Kroger Co.*, 61 Ohio St. 3d 501, 575 N.E.2d 439, syllabus (1991). In modifying *Barker*, the *Mauzy* court quotes *Kohmescher* as follows:

> Research indicates that the *McDonnell Douglas* standards borrowed in *Barker*, *supra*, were never intended to be applied strictly. . . . Moreover, as the high court stated in *Trans World Airlines, Inc. v. Thurston*, [469 U.S. 111 (1985)], . . . ". . . the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination. . . ." As the court stated in *Barnes v. GenCorp., Inc.* (C.A 6, 1990), 896 F.2d 1457, 1464: ". . . the importance of the *McDonnell Douglas* 'test' is its discussion of the elements a plaintiff must prove to establish a prima facie case of discrimination absent direct, circumstantial, or statistical evidence of discrimination." *Mauzy*, 664 N.E.2d at 1276-1277 (emphasis added), citing *Kohmescher*, 61 Ohio St. 3d at 504-506, 575 N.E.2d at 442-443.

In all, the *Mauzy* court refers to *McDonnell Douglas* 15 times in its decision on discrimination. The *Mauzy* court cites or makes reference to 35 U.S. Supreme Court, Federal Circuit Court and District Court cases, and only

two Ohio cases -- *Kohmescher* and *Barker*, both of which rely on federal case law. Clearly, the Ohio Supreme Court feels compelled to rely entirely on federal case law to hold as it does in discrimination cases.

This Court has held that when

> a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision. *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983).

The interpretation of federal case law determined the results the court reached in both this case and in *Mauzy*.

This Court has exercised its jurisdiction to decide cases where the state courts relied on both state and federal law, and where the state court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Long*, 463 U.S. at 1042, citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) and *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). In *Long*, this Court reviewed the decision below under the above framework and found that an independent state ground for the decision did not exist. *Long*, 463 U.S. at 1043.

Here, the Ohio Supreme Court relies exclusively on its understanding of federal case law in the area of age discrimination. It set forth that analysis of the federal case law in *Mauzy* and adopted the same analysis in its ruling in this case six months later. The Ohio Supreme Court was compelled to rule as it did based upon its interpretation of federal law. The Ohio courts use *McDonnell Douglas* as the foundation and federal case law as the building blocks in its interpretation of discrimination cases. Thus, federal jurisdiction exists to review this decision.

II. The Reexamination Clause of the Seventh Amendment Applies to a State Supreme Court Reversal of an Age Discrimination Jury Verdict Based on Its Misinterpretation of Federal Decisional Law.

When the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, was adopted by Congress in 1967 to prohibit employment discrimination against

older Americans, there were no similar prohibitions in most of the states. Ohio adopted similar prohibitions more than 10 years later and, by 1987, made them generally enforceable through civil lawsuits heard before juries. *See* Ohio Revised Code Sections 4112.14, 4112.02(A) and (N) and 4112.99. With a head start of decades of federal decisional law in interpreting what constitutes discrimination and how it is proven, Ohio courts look expressly to federal court interpretations of similar laws for guidance. *Barker v. Scovill, Inc.*, 6 Ohio St. 3d 146, 147, 451 N.E. 2d 807, 808 (1983).

Ohio has a state court system that processes lawsuits in about half the time consumed in federal court, without the need to first pursue administrative proceedings with the EEOC. Most discrimination cases are now filed in Ohio in the state courts. The misconstruction of federal discrimination precedents by the Ohio Supreme Court in this case threatens to change the reliance on the state court system which in this case twists the expansive federal precedents on proving discrimination into (1) a bar on using circumstantial evidence in many cases, and (2) the insertion of an artificial causation requirement into proof at trial.

The Seventh Amendment has two clauses, only one of which is relevant here. Its trial by jury clause, which guarantees jury trials in civil cases, is generally restricted to federal law issues. *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) (no right to jury trial on state law issues in state courts); *Minneapolis & St. Louis Ry. Co. v. Bombolis*, 241 U.S. 211, 219-220 (1916) (state procedure of using 5/6 verdict for deadlocked juries did not violate Seventh Amendment); *Curtis v. Loether*, 415 U.S. 189, 192

(1974) (Seventh Amendment creates substantive right to jury trial of federal fair housing claim but does not require jury trial of all state law claims).

The reexamination clause of the Seventh Amendment however prohibits appellate courts from reviewing the evidence determined by the jury, exactly what the Ohio Supreme Court did here. If the clause applies, the appellate court reversal of the jury verdict may not stand. The reexamination clause cases revolve around different issues as to whether the review is of the liability or damages portion of a verdict. While the trial judge could grant a remittitur of a verdict, *Railroad Co. v. Fraloff*, 100 U.S. 24, 31-32 (1879), an appellate court could not review that determination, until recently, *Gasperini v. Center for Humanities, Inc.*, 116 Sup. Ct. 2211, 2217-19 (1996) (can the review trial judge's "deviates materially review" but only for abuse of discretion). Even the review permitted in *Gasperini* is drastically limited, and trial judges may not increase the verdict as an alternative to granting a new trial. *Dimick v. Schiedt*, 293 U.S. 474 (1935).

The other aspect of the reexamination clause is the review of jury liability determinations. For more than 150 years federal appellate courts deciding federal issues have been prohibited from reexamining facts presented to a jury. The trial court could either grant or deny a new trial, but that decision could not be reviewed on appeal, which was boldly done by the Ohio Supreme Court here. *See*, *United States v. Laub*, 37 U.S. 1 (1838); *Insurance Co. v. Folsom*, 85 U.S. 237 (1873); *Railroad Co. v. Fraloff*, 100 U.S. 24, 31 (1879); *Ayers v. Watson*, 137 U.S. 584, 597 (1890); *Luckenbach S.S. Co.*

v. United States, 272 U.S. 533, 540 (1926). Learned Hand called this rule too well established to justify discussion. *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953). In its review of the factual basis of the verdict here, the Ohio Supreme Court canvassed and construed the federal case law basis (mostly from decisions of this Court) for its justification in reexamining in detail the evidence presented to the jury including most of the 12 discriminatory statements by the decision-maker over a five-year period of time. *See* Petition at 8-10.

When a state appellate court rests its decision upon federal law, this Court has jurisdiction to review the decision. *Quinn v. Millsap*, 491 U.S. 95, 102 (1989) (state court decided federal questions before it); *Indiana ex rel. Anderson v. Beard*, 303 U.S. 95, 98 (1938) (state court decided case adversely to the federal right asserted). That the state court might have, but did not use, state law to decide the issue, does not foreclose review. *Zacchini v. Scripps-Howard Broadcast Co.*, 433 U.S. 562, 568 n.6 (1977) (Ohio court could have decided under state law but did not; so, Supreme Court had jurisdiction over the appeal). The Seventh Amendment applies to cases of federal cognizance coming from a state court. *Justices v. Murray*, 76 U.S. 278 (1870); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 n.26 (1964). In *Sullivan*, this Court applied the Seventh Amendment reexamination clause to state court cases being reviewed as follows:

> The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. That Amendment, providing that "no fact

> tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," is applicable to state cases coming here. . . . But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "This Court will review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *New York Times Co. v. Sullivan*, 376 U.S. at 285 n.26 (citations omitted).

Even if the decision of the state appellate court ultimately rests on Ohio law, if the state court "felt compelled by what it understood to be federal . . . considerations to construe and apply its own law in the manner it did," this Court has "jurisdiction and should decide the federal issue." *Zacchini*, 433 U.S. at 568 (Ohio courts).

As pointed out in the extensive dissenting opinion in the Ohio Supreme Court here (Petition at A-12 to A-40), the lead opinion by the court ignores and recasts the evidence which may be used at trial in discrimination cases as set forth in *Furnco Construction Co. v. Waters*, 438 U.S. 567, 578-579 (1978) (any kind of evidence can be used to show discrimination at trial); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715-716 (1983) (discrimination should be treated no differently than any other ultimate issue of fact) ("*McDonnell Douglas* was never intended to be rigid,

mechanized, or retrialistic"); and *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989) (employee can use a variety of types of evidence to show pretext and may not be limited to evidence of a certain type). These well-established principles and cases are fundamentally at odds with the Ohio Supreme Court's decision here limiting the use of circumstantial evidence to prove discrimination to only when all the elements of *McDonnell Douglas* are satisfied.

Finally, the Ohio Supreme Court in this case imposed a causation layer into the formula for proving discrimination which is impossible to satisfy (Petition at A-10 - A-11). A similar causation link was imposed by an Ohio appellate court in *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 114-115 (1963), in which this Court reversed the state court's application of federal law in a state proceeding. The issues of causation are best left to determination by the jury. *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 32-33 (1944). Inferences and conclusions are best left to the jury since they are the fact finding body.

> The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgtown R. Co. v. McDade* 135 U.S. 554, 571, 572 (1890); . . .. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. *Gallick*, 372 U.S. at 115.

The Seventh Amendment insures that appellate judges are not to reweigh evidence and set aside a verdict

because the jury drew different inferences or conclusions or because other results seem more reasonable. *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944).

The reversal of this unanimous jury verdict in a case which was "well and truly tried, the parties skillfully represented and the operative law correctly stated to the jury by the trial judge" (Dissent of Justice Pfeiffer, Petition at A-40), was simply wrong and was politically inspired decision-making which compels the return of the correct legal standards to Ohio and the reinstatement of the verdict.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Russell A. Kelm
Law Offices of Russell A.. Kelm
37 W. Broad Street, Ste. 860
Columbus, Ohio 43215
(614) 240-5900
Attorneys for Petitioners
Thomas J. Byrnes and Richard C. Otto

June 2, 1997